No. 15664

United States
Court of Appeals
For the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,

Appellee.

Petition of Appellant for Rehearing

Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge

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Appeal from the United States District Court for the District of Oregon.

In regard to **Appellant's Specification of Error Number One,** set out in pages 10 to 24 of Appellant's Brief in this appeal to the effect that the trial court committed prejudicial and reversible error in giving supplemental instructions to the jury without counsel or the parties being present, and counsel not having any notice thereof, appellant respectfully submits the following additional authorities and Oregon statute on the subject.

ARGUMENT

ORS. 17.325: "Return of jury for information on law. After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, **the information required shall be given in the presence of, or after notice to the parties or their attorneys.**"

The Oregon Supreme Court said, in the case of **Grammer v. Wiggins-Meyer S. S. Co.** (1928), 126 Or. 694, 270 P. 759, in construing this same statute, from the opinion at page 703:

> "7. It is asserted that the court erred in permitting the jury to return and receive additional instructions in the absence of, and without notice to, the defendant or its attorneys. Section 144, Or. L., reads:
>
> > 'After the jury have retired for deliberation, if they desire to be informed of any point in law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the parties or their attorneys.'
>
> "The only information requested by the jury when they returned into court was in reference to

the preparation of the verdict. A record was made of what the court then and there said to the jury, and the defendant was allowed an exception thereto. Under this state of facts, while the proceedings of the court were technically erroneous, the error is not so substantial as to cause a reversal of the case."

The case of **State of Oregon v. Vaughn** (1954), 200 Or. 275, 265 P. 2d 249, from the opinion at page 277, reads:

"1. The defendant contends that he had an absolute right to have the court redefine the word 'feloniously' upon the request of the jury, relying upon Sec. 5-313, OCLA, now ORS 17.325, which reads as follows:

'After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of or after notice to the parties or their attorneys.'

"It is to be noted that the mandatory obligation of the statute is that if any information as to the law is given by the trial court it shall be given in the presence of the attorneys or after due notice has been given to the parties or their attorneys. This statute does not in itself require the court to reinstruct a jury. It is, of course, necessary that the court state to the jury all matters of law which it

thinks necessary for their information in giving their verdict. Sec. 5-308, OCLA, now ORS 17.255. This was done by the trial court in its charge to the jury at the conclusion of the trial, and the word 'feloniously' was defined in words as follows:

> 'Feloniously means with criminal intent and intent to commit the crime charged.'

> "When the trial court has given to the jury an adequate instruction upon a specific issue in the case and thereafter the jury requests the court to 'reinstruct' upon that issue, the giving of such further instruction rests in the sound discretion of the trial court. State v. Johnston, 221 Iowa 933, 267 NW 698."

The case of **New York Life Ins. Co. v. Rogers** (9th Cir. 1942) 126 F. 2d 784, involved the proposition that under Arizona law an insurer had the power to waive any of the provisions or restrictions contained in an application for a life policy or in the policy itself.

In the opinion of Judge Wilbur, at page 787, this court says:

> **"The question is one of substantive law, and must, under the rule** of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, **be determined in the present case in accordance with the law of Arizona."**

Sullivan v. Shell Oil Company (9th Cir. 1956) 234 F. 2d 733 was an action for damages for personal in-

juries based on negligence. Jurisdiction of the District Court was based on diversity of citizenship, as in the case at bar.

At page 741, from the opinion, this court says:

> "This court in a diversity case is required to determine California law on our precise question."

In regard to the giving of such supplemental instructions in the case at bar, the trial judge, after verdict, said:

> "I want to say with reference to the main issue that I was surprised when I made a check and learned that you and Mr. Tatum did not waive your presence here at the time the supplemental instructions were given. I was in error. I was under the impression that you had; but I subsequently learned that the waiver referred to your presence at the time of receiving the verdict and not to the giving of the additional instructions." (T. 194, 195)

Appellant respectfully contends that he is entitled to a rehearing relative to the opinion and judgment of this court filed February 28, 1958, as this court erred, for the reason the law governing the trial court in connection with giving such supplementary instructions to the jury is to be determined in accordance with the law of Oregon, and as set forth in the foregoing statute

and cases, and the trial court should be reversed and this case remanded for a new trial.

Respectfully submitted,

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I hereby certify, that in my judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

JOHN F. CONWAY,
Attorney for Appellant.